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Marlene H. Dortch
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Washington, D.C. 20554

MAR - 6 2017

Federal Communications Commission
Office of the Secretary

Re: AT&T Opposition to Application for Review
WT Docket No. 16-335

DOCKET FILE COPY ORIGINAL

Dear Ms. Dortch:

Please find AT&T's Opposition to Application for Review filed by the Rural Wireless Association. In accordance with the Commission rule section 1.115(f), this Opposition is being filed with the Secretary for inclusion in the public record.

Thank you for your attention to this matter.

Sincerely,

Robert Vitanza

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC**

In the Matter of

**Request for Waiver of Section 27.14(g)
for Alaska B-Block License WQIZ358**

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APPLICATION FOR REVIEW**

**Federal Communications Commission
Office of the Secretary**

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**AT&T'S OPPOSITION TO
APPLICATION FOR REVIEW**

AT&T Services, Inc., on behalf of its subsidiary AT&T Mobility Spectrum LLC, (collectively, "AT&T") and pursuant to Federal Communications Commission ("Commission") Rule Section 1.115(d),¹ files this Opposition to the Application for Review of the Rural Wireless Association, Inc. ("RWA").

I. INTRODUCTION

In October 2016, AT&T filed a petition in this docket seeking to satisfy the interim and end-of-term construction benchmarks for WQIZ358, covering Cellular Market Area ("CMA") 315, via population, rather than geographic, benchmarks. AT&T's petition went unopposed during and after the comment cycle until RWA filed comments in WT Docket No. 16-402, opposing a waiver request by Alaska Wireless Network, LLC ("AWN") in favor of Alaska-wide Lower 700 MHz A-Block license WQJU656.² In its comments, RWA noted that its objections as to AWN's waiver request applied equally to AT&T's waiver request for WQIZ358.³

¹ 47 C.F.R. §1.115(d).

² Comments of the Rural Wireless Association, Inc., WT Docket No. 16-335, WT Docket No. 16-402 (filed Jan. 3, 2017).

³ *Id.* at 2.

The Mobility Division of the Wireless Telecommunications Bureau (the “Bureau”), after considering and rejecting RWA’s untimely opposition, granted AT&T’s waiver request in favor of WQIZ358. RWA then filed this Application for Review, arguing that the waiver “stands in conflict with [Commission] regulation, past precedent, and public policy, and establishes a harmful precedent which should be overturned.”⁴ The Commission should act quickly to dismiss RWA’s Application in this docket, as it is without merit and merely reiterates arguments correctly rejected by the Bureau. The Bureau appropriately exercised its broad discretion to grant the waiver by finding that the underlying purpose of Section 27.14(g) would be frustrated by application of the rule, that grant of the waiver will serve the public interest, and that application of Section 27.14(g) would be contrary to the public interest in view of the unique factual challenges of serving Alaska.⁵

The Bureau’s waiver grant was consistent with prior Commission rules, precedent, and policy. The Bureau is authorized to grant a waiver under Commission Rule Section 1.925 and has previously exercised that option for other Alaska licenses. The Commission has also recognized that population-based construction benchmarks are appropriate for large, difficult to serve areas. And, AT&T’s diligent build-out of the market to already cover over 70% of the population of CMA 315 and commitment to increase that coverage to at least 80% refutes RWA’s claim that the waiver promotes spectrum warehousing. Moreover, contrary to RWA’s claims, applying the Section 27.14(g) geographic benchmarks to WQIZ358 would in fact harm AT&T by accelerating its build schedule before third parties can acquire unserved area that AT&T may have intended to serve.

⁴ Application for Review of the Rural Wireless Association, Inc., WT Docket No. 16-335 (filed Feb. 17, 2017) (the “Application”).

⁵ Waiver Letter at 3.

The Bureau thoroughly examined the record and, in an appropriate exercise of its broad discretion, determined that application of the Section 27.14(g) geographic construction requirements would frustrate their purpose, would be inequitable and unduly burdensome in view of CMA315's unique environment and demographics, and grant of a waiver would "serve the public interest by fostering the provision of new wireless services to areas of Alaska that may otherwise continue to be underserved."⁶

II. DISCUSSION

Section 1.925(b)(3) authorizes the Commission to waive its rules upon a showing that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁷

The Bureau granted AT&T's Petition for Waiver based upon both 1.925(b)(3)(i) and (ii). RWA challenges the grant on both fronts.

A. The Bureau correctly concluded that the geographic construction requirements would frustrate their underlying purpose and that a waiver grant would serve the public interest under Section 1.925(b)(3)(i).

RWA first challenges the Bureau's decision that WQIZ358 warranted a waiver under Section 1.925(b)(3)(i) because the Waiver Letter focuses entirely upon the "public interest benefit" and "contains no plausible discussion" as to how the waiver furthers the purpose underlying the Section 27.14(g) construction requirements or how enforcing the geographic construction

⁶ Waiver Letter at 6.

⁷ 47 C.F.R. §27.14(g).

benchmarks would frustrate the purpose of the rule.⁸ To the contrary, the Bureau carefully reviewed the record and found that the underlying purpose of Section 27.14(g) would be frustrated by its application and that grant of the requested waiver would serve the public interest.

The Bureau explained that the underlying purpose of Section 27.14(g) is “to better promote access to spectrum and the provision of service, especially in rural areas.”⁹ The Bureau also observed that all of CMA315 is rural and that AT&T’s continued expansion of service to small villages and new communities would by definition expand service to rural areas. The Bureau conditioned the waiver grant on AT&T expanding service in CMA315 to at least 80% of the population of CMA315 and maintaining that level of service for five years, 10% higher than the 70% population benchmark for the Lower 700 MHz E Block and a higher population-based benchmark than required in any other commercial service, which promotes rural build-out. The Bureau concluded that “absent a waiver, the provision of wireless services to Alaskans in CMA315, especially those residing in particularly remote areas, could be delayed, frustrating the underlying purpose of Section 27.14(g).”¹⁰

RWA may disagree with the Bureau, but it cannot reasonably argue that the Bureau did not address each element of Section 1.925(b)(3)(i). The Bureau determined that allowing AT&T to continue expanding service to CMA315 (and to do so by covering at least 80% of the population of the CMA for five years) is the best means to utilize this Lower 700 MHz B-block spectrum and to expand the provision of new advanced services to that population, rather than to speculate that RWA members (or any other provider) would later apply for unserved area and meet those same

⁸ Application at 2.

⁹ *Supra* note 6.

¹⁰ *Id.*

construction requirements. The Bureau does not come to this conclusion in a vacuum, as its experience in the Cellular service is that even after 25 years, “[i]t is likely to be many years before the Alaskan CMA Blocks are substantially built out.”¹¹ The Bureau also knows that incumbent licensees are the most likely to perform these build outs to serve new communities, activity that is especially important to promote in Alaska, where communities tend to arise in pockets. Thus, not only does the application of Section 27.14(g) in this circumstance frustrate the purpose of the rule, but granting the waiver in these circumstances is in the public interest.

RWA further supports its claim that the Bureau’s waiver grant is contrary to Section 1.925(b)(3)(i) by citing extensively to the Commission’s decision that geographic-based benchmarks would maximize coverage for CMA.¹² But, the Commission did not, by reaching this conclusion for *all* 700 MHz CMA-based licenses (or by not foreseeing a waiver of those benchmarks) foreclose its ability to grant a waiver of those geographic-based benchmarks for a particular license. In fact, the Commission recognized as much by expressing a willingness to relieve a licensee’s obligations when “unavoidable circumstances beyond the licensee’s control delay construction.”¹³

Moreover, the Commission has previously recognized that it would consider waiving construction benchmarks on a case-by-case basis where the circumstances are unique, including in situation where compliance is difficult due to low population density, and where a waiver would

¹¹ Amendment of Parts 1 and 22 of the Commission’s Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area, *Notice of Proposed Rulemaking and Order*, WT Docket No. 12-40, 27 FCC Rcd 1745, 1762 (2012).

¹² Application at 7-8.

¹³ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al.; *Second Report and Order*, WT Docket No. 06-150, et al., 22 FCC Rcd 15289, 15348 (2007) (“Second Report and Order”).

serve the public interest.¹⁴ The Commission in the past has waived build requirements for Alaska due to the unique challenges of providing service in its remote, rural areas.¹⁵ In this case, the Bureau appropriately ruled that the unique challenges of serving CMA315 justify grant of a waiver of the geographic coverage benchmarks.

RWA's reliance on the Commission's decision to apply geographic-based benchmarks to CMA licenses is also misplaced because its reasoning supports the Bureau's waiver grant in this docket. The Commission adopted population-based benchmarks for Upper 700 MHz Regional Economic Area Group ("REAG") licenses because of their large geographic size:

With regard to the use of population-based benchmarks for REAG licensees, we agree . . . that this type of build-out requirement is appropriate for licensees with large geographic areas to allow for roll out of advanced services on a nationwide or regional basis. In particular, we are mindful of the significant capital investment and logistical challenges associated with building a regional or nationwide system without an existing infrastructure.¹⁶

What is CMA315 but a large geographic area with logistical challenges and, for the most part, a lack of existing infrastructure that requires a significant capital investment to build-out? As the Bureau observed, CMA315 covers more than 376,863 square miles—larger in size than eight of the 12 REAGs¹⁷—44% of the CMA is within the Arctic Circle and much of the CMA is

¹⁴ See Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994), citing *WAIT Radio v FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁵ Request for Waiver and Extension of Time to Construct Ten Cellular Locations – KNR318, DA-07-3807, 22 FCC Rcd 16273 (WTB 2007).

¹⁶ *Second Report and Order*, 22 FCC Rcd at 15351.

¹⁷ CMA315 is larger than REAGs 1-Northeast (146,174 sq. mi.), 2-Southeast (256,634 sq. mi.), 4-Mississippi Valley (362,906 sq. mi.), 8-Hawaii (6,445 sq. mi.), 9-Guam and Northern Mariana Islands (392 sq. mi.), 10-Puerto Rico and U.S. Virgin Islands (3618 sq. mi.), 11-American Samoa (77 sq. mi.), and 12-Gulf of Mexico (226,112 sq. mi.).

inhabited by wild animals and can only be reached by aircraft or snowmobile in good weather.¹⁸ CMA315 is exactly the type of license that the Commission considered conducive to population-based benchmarks. And, contrary to RWA's suggestion that the Commission's reasoning applies only to "a nationwide rollout or a new service provider,"¹⁹ the Commission considered population-based benchmarks for existing providers as well:

[A]s compared to geographic benchmarks, the use of population benchmarks is more consistent with the recommendations and likely business plans of existing nationwide service providers such as AT&T and Verizon Wireless. As these large providers expand into more advanced services such as broadband, they, like new entrants, will need to spread the costs of developing such operations over as many customers as possible. The use of population-based benchmarks, rather than geographic benchmarks, allows these new *and existing providers* to promptly and efficiently develop these new services, thus reaching more consumers more quickly.²⁰

Hence, the Bureau's decision to grant AT&T's waiver request for WQIZ358 is entirely consistent with Commission past precedent and public policy.

B. The Bureau correctly concluded that the unique environmental and demographic factors in CMA315 make application of the geographic coverage benchmarks contrary to the public interest under Section 1.925(b)(3)(ii).

RWA acknowledges the challenging environment of Alaska, but argues that it is not unique.²¹ Commissioner O'Reilly disagrees:

Alaska is unique compared to the "lower 48" states. . . . Vast mountains and rivers slice the state into pieces, leaving its many communities and villages isolated and without the transportation options we take for granted in the contiguous states. I flew for hours over the southwestern portion of the state without spotting a single road. That means supplies must be shipped in by airplanes, helicopters, boats, or barges, and these services may be available only by charter making deliveries both infrequent and expensive. And then there are the weather challenges. For up to nine months out of a year, Alaskans can experience

¹⁸ Waiver Letter at 4.

¹⁹ Application for Review at 7.

²⁰ *Second Report and Order*, 22 FCC Rcd at 15351 (emphasis added).

²¹ Application at 10-11.

what reminds me of some of the worst weather days in my hometown of Buffalo, resulting in substantially shortened construction and repair seasons. These factors, combined with a population distribution heavily skewed towards Anchorage, make serving the sparsely populated rural and isolated areas very complicated.²²

Regardless of how RWA spins it, the combination of factors in CMA315 is, in fact, unique and makes it impracticable to meet the Section 27.14(g) geographic construction benchmarks.

RWA further claims that application of Section 27.14(g) is not contrary to the public interest because AT&T is not harmed. But, RWA conveniently ignores the fact that a two-year reduction in the license term is harmful because it accelerates the build-schedule for that CMA and enhances the prospect that the licensee will lose areas that it intended to build-out during those two years if it does not hit that accelerated schedule. That would be the result for WQIZ358. The Commission certainly intended the two-year reduction as a negative consequence for missing the interim construction benchmark. Such a reduction in this case would be inequitable.

RWA's further claims that the waiver allows AT&T to warehouse spectrum and is against the public interest. These claims also miss the mark. AT&T has steadily expanded service in CMA315 since its acquisition, serves greater than 70% of the population of the CMA, and has committed to serve at least 75% and 80% of CMA315's population by June 13, 2019 and June 13, 2020, respectively. However "spectrum warehousing" is defined, AT&T's activity in CMA315 with WQIZ358 certainly does not fit.²³ And, AT&T's experience meeting the interim geographic coverage benchmark for the other three Lower 700 MHz B-block licenses in Alaska (WQIZ597

²² FCC Blog of Commissioner Michael O'Reilly (Sept. 5, 2014), available at <https://www.fcc.gov/news-events/blog/2014/09/05/alaska-lessons-learned>.

²³ See, e.g., Comprehensive Review of Licensing and Operating Rules for Satellite Services, IB Docket No. 12-267, *Second Report and Order*, 30 FCC Rcd 14713, 14735 (2015) (defining warehousing to involve no intent to bear the cost and risk of constructing, launching, and operating a satellite or not being fully committed to doing so).

(CMA316 Alaska 2-Bethel), WQIZ598 (CMA317 Alaska 3-Haines), and WQJU565 (CMA187 Anchorage, AK)) belies any argument that AT&T is using the unique situation in Alaska to warehouse spectrum.

The Bureau observed that AT&T's commitment to negotiate in good faith with any third party seeking to lease spectrum in unserved area would "ensure access to unused portions of the License area by other providers, including any RWA members."²⁴ Although the Bureau included this commitment as a condition in the waiver, AT&T would submit that this condition was not necessary to substantiate the waiver. AT&T had already met its burden under Sections 1.925(b)(3) to justify the waiver grant. The lease negotiation condition just tilts the scales even further in support of the Bureau's decision to grant the waiver, which is already warranted by the unique factual challenges of serving Alaska and the public interest in promoting AT&T's ability to serve new communities in remote rural areas.

III. CONCLUSION

Despite RWA's incredible claim to the contrary, it is well-established that Alaska is unique, challenging the wireless licensees that serve Alaskans. The Bureau is also cognizant of the fact that those challenges discourage build-out in rural areas of Alaska, such as geographically vast and diverse CMA315. In view of these facts, the Bureau correctly concluded that application of Section 27.14(g)'s geographic coverage benchmarks to WQIZ358 would frustrate the purpose of the rule—to better promote access to spectrum and the provision of service, especially in rural areas. Grant of the waiver to allow AT&T to meet its construction requirements in CMA315 using population-based benchmarks also recognizes that the significant capital investment required to build-out Alaska, and CMA315 in particular, makes it more likely that a diligent incumbent

²⁴ Waiver Letter at 6.

licensees will perform that build-out and serve emerging communities on the fringes of existing coverage. AT&T's expansion of service to at least 80% of CMA315 will serve the public interest by introducing advanced services to rural areas. With these facts, the Bureau correctly concluded that a waiver is justified.

March 6, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

On March 6, 2017, I served an electronic version of the foregoing document by electronic mail to:

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